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No. 82-312

IN THE

Supreme Court of the United States

October Term, 1982

OHIO-SEALY MATTRESS MFG. CO., ET AL.,

Petitioners,

v.

SEALY, INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals which affirmed a final decree of the district court granting equitable relief in a private antitrust suit brought by petitioner against respondent. The decision below is not in conflict with any decision of any other court of appeals or inconsistent with

any decision of this Court. No novel or substantial issue of law is raised by the petition and further review is not warranted.

The Proceedings

On a prior appeal (585 F.2d 821, A51 *et seq.*)[1] the court of appeals affirmed a money judgment in favor of petitioner and remanded the case to the district court for the sole purpose of reconsidering equitable relief. The money judgment that was affirmed resulted from a general verdict of a jury following a lengthy trial. The trial judge had found that the amount of the verdict was excessive because of prejudicial conduct of petitioner's counsel during the trial and had ordered a new trial or, in lieu thereof, a remittitur of 50% of the amount of the verdict. Petitioner accepted the remittitur. On respondent's appeal, the court of appeals held that the evidence was sufficient to support the jury's verdict. The court also rejected respondent's argument that the prejudice found by the trial judge could not be cured by remittitur; it ruled that the trial judge had erred in finding prejudicial misconduct. In so ruling, the court of appeals stated that the principle of *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) not only bars a plaintiff from appealing an accepted remittitur but "also forecloses [plaintiff] from seeking reinstatement of the 50% remitted now that [defendant] attacks the remittitur on appeal." 585 F.2d at 840, A86.

Respondent satisfied the affirmed judgment. On remand petitioner nevertheless moved the district court to reinstate the remitted portion of the jury's award. The motion was denied. Petitioner also made various motions to supplement its complaint and hold a jury trial on claims for post-verdict damages. (Petitioner previously had filed a separate action, which is still pending in the district court, for recovery of such post-verdict damages.) Those

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1. References are to the Appendix contained in the Petition For A Writ Of Certiorari.

motions were also denied. The district court then proceeded, in accordance with the mandate of the court of appeals, to determine appropriate equitable relief. Following an evidentiary hearing, the district court entered a broad injunctive decree, discussed more fully below. On petitioner's appeal, the court of appeals affirmed the district court's decree, as well as its refusal to reinstate the remitted portion of the verdict and its refusal to allow a supplemental complaint for additional damages. (669 F.2d 490, A1 *et seq.*) Petitioner seeks review of that decision.

The Facts

Respondent Sealy, Inc. owns a number of trademarks relating to mattresses and other bedding products. It licenses these trademarks to a number of independent manufacturers, located in different geographic areas, who manufacture and sell Sealy bedding pursuant to specifications issued by Sealy. Sealy also provides a variety of advertising and technical services to the licensees.[2] Sealy was formed many years ago by a number of small manufacturers in different parts of the country in order to establish a national brand that could be marketed in competition with those of integrated national firms.[3] Each original licensee, and others as added, received stock in Sealy and almost all of Sealy's stock is presently owned by licensees and their family members.[4]

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2. As a result of Sealy's acquisition of a number of former licensees, Sealy also has wholly-owned subsidiaries which manufacture bedding in various parts of the country.

3. The mattress-manufacturing market is highly fragmented. As of 1972 the 50 largest firms accounted for approximately 54% of the market. U.S. Bureau of the Census, Census of Manufacturers, 1972, Special Report: Concentration Ratios in Manufacturing, MC 721 (SR)-2. There are a number of licensing groups similar to Sealy.

4. Petitioner Ohio-Sealy was one of the founding licensee-stockholders and was for many years one of the principal stockholders. Since the beginning of this litigation in 1971 it has sold all of its Sealy stock to Sealy or other stockholders.

The original license agreements between Sealy, Inc. and its manufacturer-licensees assigned each licensee an exclusive territory for the manufacture and sale of Sealy products; Sealy promised not to license any other person to manufacture or sell in the designated area, and each licensee was forbidden to sell Sealy products outside its assigned area. In *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), A157 *et seq.*, it was held that these "mutually exclusive territories" were illegal per se. In reaching that conclusion the Court characterized the restrictions as "horizontal" because the licensee-stockholders constituted Sealy's board of directors and thus directly controlled the day-to-day business of the corporation. (350 U.S. at 352-54, A158-60.) Because Sealy had also engaged in retail price-fixing, the Court found that there was an "aggregate of restraints" which justified the conclusion of per se illegality. (350 U.S. at 357-58, A163.)

On remand, the government and Sealy worked out a remedial decree whereby Sealy was enjoined from restricting its licensees to sales within prescribed territories. On entry of the decree the government stated to the Court that it did not interpret the decree as prohibiting per se the use of manufacturing location clauses, areas of primary responsibility, or pass-over provisions. (*See* 585 F.2d at 826, A58.) Sealy then amended its license agreements by eliminating exclusive sales territories. The revised agreement designated areas of primary responsibility, licensed each licensee to manufacture at a specified location or locations within the area of primary responsibility, and promised not to license others to manufacture Sealy products within a licensee's area of primary responsibility. The licenses also provided for pass-over payments to be made on sales within another licensee's area of primary responsibility, measured by the home licensee's advertising and promotion expenses per unit of sale, as well as a small charge to cover potential warranty repairs that the home licensee might be called upon to make on such sales. These latter provisions were intended to prevent the outside licensee from obtaining a "free ride" on the home licensee's pre-sale and post-sale costs.

The present suit by petitioner, one of the licensees, attacked the revised license agreement. The suit charged that various provisions of the new license agreement (including those mentioned as well as a right-of-refusal clause allowing Sealy, Inc. to purchase the business of a selling licensee) constituted, in the aggregate, a market-allocation scheme that was illegal per se. The jury returned a verdict in favor of petitioner. In upholding the verdict on the first appeal, the court of appeals reasoned that the jury could have found that the restraints, in combination, had a purpose and effect that was illegal per se. The court noted, however, that the exclusive manufacturing areas alone did "little more than set the stage for the balance of the restraints attacked," that Ohio did not attack the exclusive manufacturing areas except in a limited way, and that the exclusive manufacturing areas standing alone were consistent with significant intrabrand competition. (585 F.2d at 828, A62.) In remanding for further consideration of equitable relief,[5] the court stated that "We do not mean to say by any means that the court must find any particular practice attacked by Ohio to violate the antitrust laws." (585 F.2d at 844, A95.)

Meanwhile, during the pendency of the first appeal Sealy had revised its corporate structure by eliminating any licensee representation on the board of directors and substituting a board composed of independent businessmen having no interest in or connection with any of the licensees. On remand the district court found that the present board consists of "men of stature and experience, capable of making independent economic and legal business decisions." (A151.)

The decree entered by the district court on remand went well beyond any relief that might reasonably be necessary to create

5. The district court had denied equitable relief. Its conclusion assumed that the general jury verdict, which encompassed a variety of antitrust charges in addition to the market-allocation claim, had not conclusively established any specific antitrust violation. The court of appeals held that this was error. 585 F.2d at 844, A95.

abundant potential for competition among Sealy licensees. (A153-55.) The decree (1) eliminated the plant-location clause, thus enabling licensees to locate manufacturing plants anywhere within their areas of primary responsibility; (2) eliminated pass-over payments, thus enabling licensees to "free-ride" on the home licensee's promotion efforts and expenditures; (3) eliminated the warranty-repair charge; (4) enjoined use of the right-of-first-refusal clause for any anticompetitive purpose; (5) eliminated a clause forbidding licensees to own interests in other major mattress brands;[6] and (6) placed certain restrictions on the clause dealing with transfer of licenses.[7]

The district court declined to enjoin or modify the provision which assures a licensee that Sealy will not license other persons to manufacture Sealy products within the licensee's area of primary responsibility. Petitioner did not request total elimination of the clause but only that it be modified to require Sealy to grant such licenses on some objective standard. Petitioner's own expert testified that an unlimited right of licensees to build plants in other licensees' areas could lead to excess capacity and be harmful to interbrand competition. (A133.) The expert was unable, however, to propose any more limited standard that the district court found workable. (A134-35.) The district court concluded that any relief that had the effect of giving a licensee the right to manufacture wherever it pleased would threaten the efficiency of the Sealy organization and its effectiveness as a competitor in the interbrand bedding market. The court also concluded that such relief would be tantamount to permitting a licensee to appropriate the trademark rights of Sealy. (A132-35.)

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6. The licensees had always been free to make and sell private-brand bedding without restriction.

7. Other provisions of the decree enjoined certain practices that had been challenged as tying violations. The court declined to order divestiture of three licensees that had been acquired by Sealy. Those aspects of the decree are not in issue here.

REASONS FOR DENYING THE WRIT

The questions on which review is sought involve no conflict with any decision of this Court or of any other court of appeals. The decision below, which ends an eleven-year-old lawsuit,[8] is clearly correct; the issues have been fully considered in two opinions of the court of appeals; and further review is unwarranted.

I. The Antitrust "Question" Posed By Petitioner Is Not Presented By The Record And The Decision Below Is Clearly In Accord With The Decisions Of This Court.

Far from presenting any antitrust issue "of unusual importance" (Pet. 4), the decision below raises no novel question whatever. It involves no substantive question of antitrust liability but only the shaping of appropriate relief in the circumstances peculiar to the facts of this case.

The framing of equitable relief in antitrust cases rests largely in the discretion of the district court. *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947). The district court granted extensive relief, framing a decree that the court said required "surgical skill." (A153.) The court of appeals found that the district court's discretion had been properly exercised and that the relief awarded was fully adequate to prevent any future antitrust violation that could properly have been found. The decision below is entirely consistent with the decisions of this Court and raises no issue of law calling for review by this Court.

1. The case does not present the question whether "horizontal allocation of exclusive manufacturing territories" is illegal, per se or otherwise. The "horizontal" characterization is merely

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8. Subject only to determination of attorney's fees, a matter presently before the district court.

argumentative, and begs the question. The court of appeals made no such characterization, and the facts neither require nor support it.

United States v. Sealy, Inc., 388 U.S. 350 (1967) and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) are inapplicable. In *United States v. Sealy* the "horizontal" nature of the organization, and therefore of the restraints, was deemed to flow from the fact that the licensees were also actively in charge of the management of the trademark owner, as members of the board of directors and its executive committee. 388 U.S. at 353-54, A158-60.[9] The same was true in *United States v. Topco Associates*, 405 U.S. at 598-99, 609.

The Sealy organization no longer has the structure deemed decisive in those cases. It is not managed or directed by the licensees but by a board having no connection with the licensees. Sealy's evidence that the board is in fact independent was not challenged by petitioner at the hearing on equitable relief and the evidence stands uncontradicted. (A151.) This Court could not properly treat the present organization as "horizontal" without making its own findings of fact for which there is no record support.

As this Court's *Sylvania* opinion recognized, the classification of restraints as vertical or horizontal is not always automatic or self-evident. *See Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28 (1977); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979). That issue itself turns on issues of fact that cannot properly be determined by this Court in the first instance, and it would not assist in clarifying

9. Mr. Justice Harlan, dissenting, explained why the restraints could not properly be viewed as horizontal even under the corporate structure as it then existed. *See* 388 U.S. at 360-61, A165-67.

the antitrust laws for this Court to address, in the unique circumstances of this case, the question of the proper "classification" of the restraint in issue — or, as petitioner puts it, a question of antitrust "taxonomy" (Pet. 6).

The case obviously does not fall within the per se rule against price-fixing; the decisions cited by petitioner at page 6 of its petition are not in point.

2. The decision below, permitting respondent to retain its exclusive manufacturing territories, is not only consistent with this Court's decisions in *Sealy* and *Topco*, *supra*, but is directly supported by the Court's later *per curiam* decision in *United States v. Topco Associates, Inc.*, 414 U.S. 801 (1973) ("Topco II"), a decision ignored by petitioner.

The decision in *United States v. Sealy* was addressed to the "mutually exclusive" territories embodied in the former Sealy licenses — i.e. the exclusive sales territories, which prevented any intrabrand competition among the Sealy licensees. The decision was so understood by the government and by the district court, which entered a decree only forbidding provisions that restricted a licensee to "sales" within a prescribed territory. The *Sealy* decision was also so understood by this Court in the *Topco* case, which also invalidated exclusive *sales* territories. *See United States v. Topco Associates, Inc.*, 405 U.S. at 609.

Any question about the scope of those decisions was laid to rest by *Topco II*. On remand after the first *Topco* decision, the district court entered a decree expressly permitting location clauses, areas of primary responsibility, and pass-over payments. In support of such a decree the district court observed:

> [I]t is clear that a trademark owner must exercise some control over the licensee's use of the mark or it may become public property.... [I]t is essential that any member's license to use the various Topco trademarks be limited both as to time and space.... [N]obody interprets the Supreme Court's decision herein to

> require that, in the future, all members' franchises be unlimited both as to time and space. (1973-1 Trade Cases ¶ 74,485 at pp. 94,155-56 (N.D. Ill. 1973).)

The government appealed the decr[illegible] this Court, contending that it was inconsistent with the Court's decision. This Court affirmed. 414 U.S. 801.

The *Topco* decree and this Court's affirmance completely refute petitioner's apparent contention (Pet. 5) that all license restrictions, even as Sealy was previously constituted, are illegal per se. *A fortiori* there is no such per se rule applicable in the context of Sealy's present structure.

The decree entered by the district court in this case permits much greater latitude for intrabrand competition among licensees than did the *Topco* decree. Because mattresses can economically be shipped for substantial distances, any licensee can reach the markets at least of adjacent licensees and probably of others even more distant. Petitioner's own contention prior to the relief granted below was that the effective radius from a particular plant was only 300 miles. Even on that assumption (which was disputed by Sealy), elimination of the plant-location clause greatly extends the market area potentially available to a single licensee from plants within its assigned area of primary responsibility. *See, e.g.*, Exhibit 408, following A230. Elimination of the pass-over and warranty charges extends the potential range even more since the money saved by their elimination can be used to defray additional transportation costs.[10]

Under the circumstances, any contention that the designation of exclusive manufacturing areas creates an unreasonable restraint on intrabrand competition, let alone should be deemed a per se violation, is patently absurd.

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10. Ohio itself is presently making sales as far distant as California.

3. The recent decisions of this Court afford no basis for suggesting that the per se holdings in *United States v. Sealy* and *United States v. Topco* should be extended beyond their particular facts. Rather, the serious question — though of course not raised by the petition — is whether those decisions themselves can be reconciled with this Court's later rulings. *See Louis, Restraints Ancillary to Joint Ventures and Licensing Arrangements*: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music? 66 U. Va. L. Rev. 879 (1980). The decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) rejected the per se rule against price fixing in a "horizontal" context, recognizing that restraints in a joint-venture enterprise cannot be "wholly equated with a simple horizontal arrangement among competitors." *See* 441 U.S. at 23; *see also United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113-14 (1975).

Sealy, like ASCAP and BMI, is a joint venture formed to make possible a "product" that would not otherwise have existed: a national bedding brand enabling small independent manufacturers to compete with integrated national firms. In the light of the *BMI* decision, the restr tions in Sealy's licenses should properly be analyzed under the Rule of Reason as ancillary restraints that may be essential to the successful accomplishment of the main purpose of the enterprise, and thus within the rationale of the "vertical" restraints considered in *Continental TV v. GTE Sylvania. See* Brennan, J. (dissenting on other grounds), *United States v. Citizens & Southern National Bank*, 422 U.S. at 144-45; *United States v. Topco Associates, Inc.*, 319 F.Supp. 1031, 1038 (N.D. Ill. 1970); *see* Burger, C.J., dissenting, and Blackmun, J., concurring, in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612-24.

4. Anticipating a possible reply brief, we respond to an additional argument made by petitioner in the court below — namely, that the challenged license provision must be treated as

"horizontal" (and therefore per se illegal) because of the fact that Sealy itself is a manufacturer, through subsidiaries, in some areas of the country, and thus is an actual or potential competitor of its licensees. This "dual-distributor" argument for per se illegality in connection with territorial restrictions has been uniformly rejected in numerous recent courts of appeals' decisions. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354-57 (9th Cir. 1982) (refusing to apply per se rule to exclusive manufacturing territories of trademark licensor that also manufactured in territories reserved to itself); *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981); *Donald B. Rice Tire Co., Inc. v. Michelin Tire Corp.*, 483 F.Supp. 750 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4th Cir. 1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir. 1980); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981). Although the opinion below did not expressly address this argument, the opinion's tacit rejection of the argument was clearly correct and raises no conflict among the circuits.

All of petitioner's arguments concerning the exclusive manufacturing clause were thoroughly canvassed in the court below, both on initial hearing and in supplemental briefs on petitioner's request for rehearing en banc, which was unanimously denied.

II. The Settled Rule as to the Finality of an Accepted Remittitur Raises No Substantial Constitutional Question.

The court below correctly rejected petitioner's attempt to repudiate its acceptance of a remittitur and of satisfaction of a judgment of $13 million based thereon. The court's decision was in accord with a settled line of decisions of this Court stretching back to 1889, most recently reaffirmed in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977).

The doctrine was explained in *Lewis v. Wilson*, 151 U.S. 551, 554-55 (1894) in terms strikingly applicable here:

> This is a most extraordinary case. Nearly two years after a judgment has been formally entered, and after the plaintiff has received payment and acknowledged full satisfaction, he comes in and moves the court to enter a new judgment in double the amount....
>
> [T]here is nothing which prevents a party having a verdict from consenting to its reduction; and if he does so...he may not...repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict.... [W]hen advised that a new trial will be granted, unless he consents to a reduction of the verdict, he may, although knowing that the court has no power to grant such new trial, and that if it be done an appellate court will correct the error, consent to a reduction and let judgment be entered for the amount of the verdict thus reduced. And if he does so, he is concluded by his action in that respect.

In the present case the court of appeals permitted the plaintiff to assert error by the trial court for the limited purpose of sustaining the judgment plaintiff had obtained (585 F.2d at 840, A86-87; *cf. Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1085 (7th Cir. 1978)) but correctly ruled that plaintiff could not thereafter seek reinstatement of the remitted portion of the verdict.

The long-settled rule as to the finality of an accepted remittitur clearly raises no substantial Seventh Amendment question. Just as a party may waive a jury trial in the first instance, so may a plaintiff waive a new trial in order to escape the risk of losing the judgment he has already obtained. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court rejected the device of *additur* as contrary to common-law practice at the time of adoption of the Constitution. At the same time, however, the Court distinguished, and declined to disturb, the doctrine of remittitur "first announced by

Mr. Justice Story in 1822 [and] accepted as the law for more than a hundred years and uniformly applied in the federal courts since that time." 293 U.S. at 484-85.

III. Petitioner's "Rule 54(c)" Argument is Frivolous.

With extraordinary temerity, petitioner asks the Court to grant certiorari to reverse a trial court's exercise of discretion, upheld by the court of appeals, in declining to allow a supplemental complaint for damages after an extended jury trial, after an appeal and a remand for the sole purpose of equitable relief, and where the plaintiff had already filed and was vigorously litigating a separate action seeking the very damages sought in the supplemental complaint.

The allowance of supplemental pleadings rests in the discretion of the trial court. Rule 15(d), Fed. R. Civ. P. Rule 54(c) does not repeal Rule 15(d). If a supplemental pleading is properly denied under Rule 15(d), the party has received "the relief to which [it] is entitled."

The trial court's denial of the supplemental complaint was obviously proper under the circumstances. Indeed, a different ruling would have been plainly contrary to the mandate of the court of appeals. In any event, petitioner can suffer no conceivable prejudice since it is presently actively pursuing the very same claims in a second action which it filed long before it presented the supplemental complaint in the instant action.

CONCLUSION

The sole question before the district court in this case was the determination of appropriate equitable relief in this private antitrust action. The district court granted substantial relief. The question before the court of appeals, therefore, was only whether the district court had abused its discretion in shaping the decree, a function peculiarly vested in the district court. The court of appeals held that there was no abuse of discretion. Further review by this Court is not warranted.

Respondents respectfully submit that the writ of certiorari should be denied.

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STATEMENT IN COMPLIANCE WITH RULES 22.2 AND 28.1

Respondent Sealy, Incorporated has no parent companies, affiliates or subsidiaries other than wholly-owned subsidiaries.

Sealy, Incorporated is the parent corporation of respondents SEALY SPRING CORPORATION-EAST (now known as Sealy Spring Corporation, a Delaware corporation), SEALY SPRING CORPORATION-INDIANA (now a division of Sealy Spring Corporation), SEALY SPRING CORPORATION-WEST (now a division of Sealy Spring Corporation), SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC. (now known as Sealy Mattress Company of Arizona, Inc.), SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., and SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.